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86-2031

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BOARD OF SCHOOL COMMISSIONERS OF
MOBILE COUNTY, ALABAMA et al

Petitioners

VS

EDWIN FOSTER & JAMES E. BUSKEY

Respondents

PETITION FOR WRIT OF CERTIORARI TO TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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May 21, 1987

10 pp

ISSUES

1. The plaintiff's counsel failed or refused to meet their burden regarding application for attorney fees under 42 U.S.C. Section 1988.

2. The plaintiff's counsel may not be compensated for the trials of 77 individual claimants who received neither injunctive nor monetary relief from the Court and whose claims were each clearly distinguished from all the other individual claims under 42 U.S.C. Section 1988

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IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM 1987

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al et al	*	
Petitioners	*	
VS	*	CASE NO.
EDWIN FOSTER & JAMES E. BUSKEY	*	
Respondents	*	

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, the Board of School Commissioners of Mobile County, Alabama, respectfully pray that a Writ of Certiorari be issued to review the Order of the United States Court of Appeals for the Eleventh Circuit entered in this

proceeding on the 19th day of February, 1987.

OPINION BELOW

The original opinion of the Court of Appeals is reported at 810 F2d 1021 (11th Cir. 1987). The Order which is the subject of this petition, un-reported, appears in the appendix hereto. The Magistrate's recommendation and the memorandum opinion rendered by the District Court for the Southern District of Alabama, appears in the appendix hereto.

JURISDICTION

The Order of the Court of Appeals was entered on the 19th day of February, 1987. (Attached as Appendix A.) A timely petition for rehearing was denied on the 16th day of March, 1987, (Attached

as Appendix B) and this petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

1. 42 U.S. Code Section 1988.

Section 42 U.S.C. Section 1988, proceedings in vindication of civil rights.

The jurisdiction in civil and criminal matters conferred on the district Courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES" for the protection of all persons in the United States in their Civil rights and for their vindication, shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable

to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the Court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said Courts in the trial and disposition of the cause, and, if it isof a criminal nature, in the infliction of punishment on the party 4 found guilty. In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981, of the Revised Statutes (42 U.S.C. Section 1981-1983, 1985, 1986), Title IX

of Public Law 92-318 (20 U.S.C. Section 1681 et seq.), or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code (26 U.S.C. Section 1 et seq.), or Title 6 of the Civil Rights Act of 1964 (42 U.S.C. Section 2000(d) et seq.), the Court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs.

(R.S. Section 722; Oct. 19, 1976, P.L. 94-559, Section 2, 90 STAT. 2641.)

STATEMENT OF THE CASE

This litigation involves 105 individuals claiming employment discrimination against the Board of School Commissioners of Mobile County,

Alabama. The action was initiated as an ill-advised and unsuccessful attempt to intervene in a school desegregation case suit by the two (2) individually named plaintiffs. They alleged they represented a class of black professionals employed by the County Board who had been discriminated against in promotions.

Eventually, this suit was severed from the main suit and two (2) subclasses were certified. The District Court ruled that the case would be tried in two (2) stages under 42 U.S.C. Section 2000. A Stage I Order was entered finding past discrimination on the part of the defendant in promotion of black professionals, setting the procedures for filing, trying and resolving Stage II individual claims by individual complaints, and awarding attorneys fees

to Mr. Blacksher, Stein, and Menefee.

Under the Stage II Order, each of the 105 individual claimants filed a claim which amounted to a prima facie entitlement to back pay, promotion, front pay and damages. The burden then shifted to the defendants to prove by clear and convincing evidence that it had not so discriminated. The Order also permitted each claimant to choose his own separate counsel or he could be represented by Blacksher, Stein and Menefee.

Additionally, a notice was sent out to each class member. In it, they were given sixty (60) days for discovery to perfect their claims. Thereafter, they filed their prima facie claims stating specifically each of their allegations. From that point, the defendant was allowed sixty days within which to conduct its discovery and then an

additional twenty (20) days within which to file specific written responses to each claim.

At the conclusion of all discovery, each case was tried. On June 5, 1985, the Magistrate issued his recommendation in which the plaintiffs prevailed on only 28 of the 105 claims. (When the District Judge finally ruled just prior to argument before the Eleventh Circuit, one (1) additional claimant received some relief.)

All the plaintiffs' attorneys subsequently filed their motions for attorneys fees making no attempt to distinguish between separate claims although their time sheets were replete with "conference with class member", "conference with class member's counsel" and "review documents of class member".

At the defendant's request, the

Court entered an Order requiring the plaintiffs' attorneys to specify class members for whom they expended time. Plaintiff's counsel, Spears & Clanton, made no attempt to comply with the Order. Blacksher, Stein, and Menefee responded that ". . . it is not feasible in most instances to attribute a particular amount of time to a certain class member".

At the scheduled attorney fee hearing, only Stein and Menefee appeared. No word has yet been received on the failure to appear by Clanton, Spears and Blacksher. Despite such omission, as well as the failure of Clanton and Spears to specify their time, a substantial fee was awarded to each with a 12.2% reduction in both fees and expenses for their lack of success, the Magistrate estimated from the inappropriate time

records and his personal recollection of the course of 105 separate trials and averaging it all out. Eventually, as previously noted, the District Judge ruled.

The petitioners appealed to the Eleventh Circuit Court of Appeals while the plaintiffs below cross appealed. Petitioners contention was that the plaintiffs should not have received compensation for any hours expended on the 77 losing claims as they were distinct and separate claims and because the plaintiffs attorney failed or refused to meet their burden.

The Court of Appeals affirmed the judgment against the defendant.

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1987

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA, et al	*	
Petitioners	*	
VS	*	CASE NO. _____
EDWIN FOSTER & JAMES E. BUSKEY	*	
Respondents	*	

REASONS FOR GRANTING THE WRIT

1. The Order of the Court of Appeals conflicts with a decision of another Court of Appeals and a decision of this Court.

Until the decision of the Eleventh Circuit Court of Appeals in this case, the rule that the burden was always on

the plaintiff's attorney seeking fees under 42 USC Section 1988 had been unequivocal. This decision of the Eleventh Circuit ignores the issue of the plaintiff's burden or at least the Judges chose not to address it.

This Court has flatly placed this burden on plaintiff's counsel, ruling that the burden is on the applicant to produce satisfactory evidence of their time, in addition to their own affidavits. Blum vs Stenson, 104 Sup. Ct. 1541, 79 L.Ed 2d 891 (1984)[1]

The lower courts have generally ruled that contemporaneous time records are a pre-requisite for the award of fees. New York State Association for Retarded Children, Inc. vs Carey, 711

[1]It should also be noted that in Blum, the plaintiff's counsel did not include time expended on moot or unsuccessful claims unlike these plaintiffs attorneys.

F2d 1136 (2nd Cir. 1983) Attorneys seeking compensation under 42 USC Section 1988 have the burden of substantiating claims to fees by submitting to the Court, full and detailed accountings of time spent on the case and the duties performed. The preferred method of establishing plaintiffs counsel's time commitment to the case has been by maintenance of time sheets prepared contemporaneously with performance of the services. Grendel's Den, Inc. vs Larkin, 582 F.Supp. 1220 (D.C. Mass. 1984)

The District Court must require the submission of relatively detailed petitions for fees and costs before holding formally on the right of the plaintiff's counsel to fees under 42 USC Section 1988. Morgan vs McDonough, 511 F.Supp. 408 (D.C. Mass. 1981)

The policy reason served in requiring detailed accounting records from plaintiff's counsel was expressed succinctly by this Court in Hensley vs Eckerhart, 76 L.Ed. 2d 40 (1983):

> ". . . the applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended in hourly rates. The applicant should exercise 'billing judgment' with respect to the hours worked, see supra at 76 L.Ed. 2d 50-51, and should maintain billing time records in a manner that will enable a reviewing Court to identify distinct claims. Id at p. 53 (Emphasis added)

In this case, plaintiff's counsel never met this burden! Each attorney submitted time sheets which failed to disclose any names of the particular claimants for whom they expended any particular time. (CR1-22) Defendant's counsel objected immediately to this

conduct and by it's Order of August 27, 1985, the District Court directed plaintiff's counsel as follows:

> "2. Plaintiffs will, to the extent feasible, specify class members to whom time entries such as 'conference with claimant' refer." (See Appendix B)

The law firm of Blacksher, Menefee and Stein, who have handled numerous class actions under the civil rights statutes, and filed numerous fee petitions, filed a pleading entitled "Plaintiffs Further Specification of Time" on September 6, 1985. In such, they admitted:

> ". . . it is not feasible in most instances to attribute a particular amount of time to a certain class member." (R1-28)

Plaintiff's counsel, Clanton and Spears, never responded to the Court's

Order of August 27, 1985. Based upon these failures or refusals on the part of plaintiff's counsel, although all these claims were clearly distinct, the reviewing court was not given the requisite billing time records which would enable it to identify distinct claims.

This refusal or failure by Clanton and Spears was further exacerbated when neither bothered to appear for the attorney fee hearing, thus denying defendant's counsel the right to cross-examine them regarding the individual claimants they worked with. They were joined in this by Attorney Blacksher who also did not appear. Stein and Menefee testified but added nothing to the question regarding specificity of their billing records.

Thus, the District Court had no proper means of reducing the hours claimed by the plaintiff's counsel based solely upon the failure of the plaintiff's attorneys. Using his best guess work, and, apparently, his recollection of 105 separate hearings, the Magistrate reasoned (and the District Judge adopted) as follows:

> "d. Having reviewed the time records submitted by Plaintiffs' counsel and having considered the actual course of proceedings, the Magistrate concludes that on average, the attorney time specifically referable to a particular claim - - for client interviews, records review, deposition attendance, discovery responses, and attendance at the evidentiary hearings -- totaled on the order of 5 to 6 hours. Applying that average, the time spent specifically devoted to unsuccessful claims approximates 380-456 hours. No more than 250 hours of that time can be said to be

> unrelated to the overall success achieved by Plaintiffs." (Appendix C)

If the District Court considered the time records submitted by the plaintiff's counsel, then a simple review of those attached records indicates that there was little if anything instructive in them. Thus, one must go to his next point; his recollection of the actual course of the proceedings. Here, he was only a witness to the actual trials themselves, yet he discussed client interviews, deposition attendance and discovery responses as well, of which he could have no knowledge without reference to the worthless time records submitted by the plaintiff's counsel.

The Magistrate decided that he relied upon evidence adduced at an unsuccessful claimant's hearing in

support of 'other claimants' cases". He failed to disclose whether these "other claimants" were successful or unsuccessful or what specific or general type of evidence he referred to. This is the same type of logic put forward by plaintiff's counsel when they failed to meet their burden as to their time records. Additionally, the Magistrate states (without objective expression or any demonstrable evidence) that he used the evidence adduced at unsuccessful claimants hearings "on the general Board defenses, or in attempting to reconstruct the actual progression process", whatever that means.

This was clearly the heart of the issues tried on attorney's fees. The plaintiff's counsel either failed or made no attempt to meet their statutory burden and the District Court adopted the

Magistrate's recommendation which made no objective distinctions because he could not and was thus reduced to guessing. In awarding attorney fees in a Title VII action, the District Court must be able to distinguish and must distinguish in protracted litigation between those hours that were related to issues or claims on which the plaintiff prevailed and on those on which they were unsuccessful. To allow otherwise is subject to an abuse of discretion standard of review. Pennsylvania vs Delaware Valley Citizens Council for Clear Air, 106 S.Ct. 3088, 3096, 92 L.Ed 2d 439 (1986); Black Grievance Committee vs Philadelphia Electric Company, 802 F2d 648 (3rd Cir. 1986)

The fact that time spent in pretrial was relevant to all claims, both those on which plaintiffs eventually succeeded and

those on which they did not, did not mean that all pretrial work was related to successful claims so as to entitle plaintiffs to attorney's fees for all time so spent. Vaughns vs Board of Education of Prince George's County, 598 F. Supp. 1262, 1272-73 (1984)

The District's Order abused the Court's discretion because it's inability to separate the pre-trial and trial as to successful and unsuccessful time by plaintiff's counsel, was due to the inadequacy of plaintiff counsel's documentation and affidavits rather than the inseparable nature of the 105 separate claims tired. Id. at 1272.

Finally, the presence of some similarities between the legal theories which underpinned all of the 105 claims does not mandate the District Court's conclusion that such claims were all

related in the face of the factual severability of the 105 separate individual plaintiffs. Id at 1273; Tasby vs Wright, 550 F.Supp. 262, 274 (N.D. Tex. 1982)

In Vaughns vs Board of Education, supra, the District Court reduced the plaintiff's attorneys hours claimed by 27%. This represented the trial transcript pages devoted to unsuccessful, unrelated claims. Supra at 1276. This was admitted by plaintiff's counsel because no more appropriate alternative was available.

In the instant case, plaintiff's counsel produced near worthless records and made no admissions regarding time on unsuccessful individual claims. Instead they claimed it was "not feasible" to specify their losing and winning time, likely due to the fact that 78/105 of

their time was spent on unsuccessful individual claims.

In Orshan vs Macchiorola et al, 629 F.Supp. 1014 (E.D. NY 1986) the Court considered penalizing the plaintiff's counsel with a 30% reduction as a sanction for non-compliance with their burden of providing contemporaneous time records which could be used by the Judge in reviewing the fee petition, citing Hensley vs Eckerhart, Supra at 1942 N. 13 as authority. See also Rosario vs Amalgamated Ladies Garment Cutter's Union Local 10. However due to the record and the case law, the Court disallowed substantially more time.

Additionally, the instant case involved the filing of 105 individual claims in a Stage II monetary awards proceeding under a Title VII action. Such hybrid class actions have attributes

of both class claims and individual claims by the class members, unlike normal class litigation. CF Holmes vs Continental Can Company, 706 F2d 1144, 1154-60 (11th Cir. 1983). In the instant case the class portions of the litigation had been resolved by the Court's Stage I order which also awarded fees to plaintiff's counsel. (R1-3)

CONCLUSION

As the 78 losing claimants received no individual injunctive or monetary relief, as each individual claim was factually distinguishable from inception to conclusion, and because the plaintiff's counsel made no attempt to meet their statutory burden, at least as to Clanton and Spears, and very little on the parts of Blacksher, Menefee and

Stein, they should be sanctioned by a reduction of their hours, fees and expenses by a formula of 77/105. Moreover, they are not entitled to an enhancement of 1.78% due to their failure to achieve substantial or innovative success at Stage II. Blum vs Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed 2d 891 (1984)

Respectfully submitted,

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APPENDICES

APPENDIX A-1

FOSTER v. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY

Edwin FOSTER, et al.
Plaintiffs-Appellees,
Cross-Appellants,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ALABAMA et al,
Defendants-Appellants,
Cross-Appellees

No. 86-7064

United States Court of Appeals,
Eleventh Circuit

February 19, 1987

Prevailing parties in civil rights ction brought motion for attorney's ees. The United States District Court or the Southern District of Alabama, No.)-0460-H-S, William Brevard Hand, Chief idge, in calculating reasonable :torneys's fees award, applied reduction approximately 12% to reflect .aintiffs' limited success and both

parties appealed. The Court of Appeals held that: (1) in determining attorney fee award to prevailing plaintiffs in civil rights action, district court was not required to reduce award by number of unsuccessful claims over total number of claims, and (2) trial court did not abuse its discretion in reducing attorney fee award to reflect limited success obtained by plaintiffs in civil rights action.

Affirmed.

1. Civil Rights 13.17(19)

Where a plaintiff in a civil rights action achieved only limited success on related claims, district court should award, under Civil Rights Attorney's Fees Award Act, on that amount of fees that is reasonable in relation to results obtained. 42 U.S.C.A. Section 1988.

2. Civil Rights 13.17(19)

In determining award of attorney's fees under Civil Rights Attorney's Fees Award Act for plaintiffs who attained limited success on their civil rights claims, district court was not required to reduce attorney's fees by number of unsuccessful claims over total number of claims. 42 U.S.C.A. Section 1988.

3. Civil Rights 13.17(19)

Trial court did not abuse its discretion when, in calculating reasonable attorney's fee award for Stage II of bifurcated class action proceeding, for class members pursuing individual civil rights claims, it reduced award by approximately 12% to reflect plaintiffs' limited success, where plaintiffs who established class-wide discrimination in Stage I of bifurcated class action had

previously received attorney's fees for their success in Stage I and where, although court order required class attorneys to continue to represent individual members in Stage II proceeding, a 30% contingency fee enhancement was allowed because recovery of attorney's fees was uncertain. 42 U.S.C.A. Section 1988.

Appeals from the United States District Court for the Southern District of Alabama.

Before FAY and JOHNSON, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

In this appeal, we review the order of the United States District Court for the Southern District of Alabama awarding attorney's fees to the plaintiffs as

prevailing parties under the Civil Rights Attorney's Fee Award Act of 1976, 42 U.S.C. Section 1988 and the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(k). During Stage I of this bifurcated class action, the plaintiffs established class-wide discrimination and were awarded attorney's fees for their successful efforts. The class members pursued individual claims for relief in Stage II of the suit. Since less than one-third of the class members obtained a favorable adjudication in Stage II, the district court, in calculating a reasonable attorney's fees award, applied a reduction of approximately 12% to reflect the plaintiffs' limited success. Finding that the district court did not abuse its discretion, we affirm the award of attorney's fees.

The long and complicated procedural history of this litigation began when Edwin Foster and James E. Buskey

intervened in the famous Birdie Mae Davis[1] school case asserting discrimination under 42 U.S.C. Section 1981 and 1983, as well as Title VII of the Civil Rights Act of 1964. The plaintiffs challenged the Mobile County School Board's practice of refusing to appoint black principals to predominately white schools alleging that this intentionally discriminatory practice resulted in a disproportionately small number of principalships for blacks. Initially, the district court denied the class status sought by the plaintiffs but fashioned general injunctive relief designed to eliminate the discriminatory assignment practice of the school board. On appeal, the second

[1] See Davis vs. Board of School Commissioners of Mobile County, 517 F2d 1044, 1046 n. 1 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976) for the many citations to this perennial litigation.

involving Foster and Buskey's claims,[2] the former Fifth Circuit Court of Appeals held that the facts found by the district court constituted a finding of class-wide discrimination justifying relief to the individual class members. Davis vs Board of School Commissioners of Mobile County, 600 F2d 470 (5th Cir. 1979), modified, 616 F2d 893 (5th Cir. 1980).

After the second remand, the district court certified the class with Foster and Buskey as the named representatives, and served the action from the original Davis case. Since class-wide discrimination had been

[2] The first appeal involved the district court's dismissal of Buskey's class action suit with leave to intervene in the suit brought by the Birdie Mae Davis class as well as other procedural issues. Davis vs Board of School Commissioners of Mobile County, 517 F2d 1044 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 183 (1976).

established in Stage I of the litigation, the district court entered an order permitting the filing of claims by members of the subclass of principals[3] in Stage II proceedings asserting individual charges of discrimination by the school board. The order provided for the submission of defenses, if any, to the claims asserted by the plaintiffs. The contested claims were referred to a magistrate as a special master for recommendation. The order further stated:

[3] After certifying the case as a class action, the district court created two subclasses of black professionals, one subclass consisting of blacks denied promotion to a principalship and another subclass consisting of blacks denied promotion to central office positions. Only the claims of the subclass of blacks denied principalships were found ripe for Stage II proceedings.

> Any principal subclass member shall have the right, pursuant to Rule 23(d) of the Federal RUles of Civil Procedure, to retain and appear through counsel of his own choosing. Subclass members who do not retain separate counsel and who do not wish to represent themselves shall continue to be represented by attorneys for the plaintiffs and plaintiff case.

Foster vs Board of School Commissioners of Mobile County, No. 86-7064 (D.Ala. Aug. 3, 1981) (order certifying class). The district court also awarded the plaintiffs attorney's fees of $20,910.00 plus expenses of $1,898.00 as prevailing parties in the Stage I proceedings establishing class-wide discrimination.

During Stage II of the class action, the special master held 104 hearings for the individual plaintiffs. The firm originally filing the suit, Blacksher, Menefee & Stein, P.A., represented the class members.[4] The special master recommended that twenty-eight of the plaintiffs receive individual injunctive and monetary relief totaling more than $2,000,000.00. Afterwards, a hearing was held on the issue of attorney's fees and the magistrate entered an exhaustive recommendation following the analysis mandated by the decision of Johnson vs Georgia Highway Express, Inc., 488 F2d

[4]The named partners of this firm, James U. Blacksher, Larry T. Menefee, and Gregory B. Stein appeared for most of the 104 plaintiffs. The firm also associated two other attorneys, Christopher Clanton and Janice Spears, to aid in presenting the claims of the class members.

714 (5th Cir. 1974).[5] After determining the "lodestar" figure by multiplying the reasonable hours expended by the reasonable hourly rate, the special master recommended a 30% enhancement based on the contingent nature of the case.

The special Master also addressed the "results obtained" factor of the

[5] In Johnson, the court set out twelve factors to be considered in awarding reasonable attorney's fees to a prevailing party. The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F2d at 717-19.

Johnson analysis under the principles set out by the Supreme Court in Hensley vs Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) and Blum vs Stenson, 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). Finding that the limited success achieved by the plaintiffs in the Stage II proceedings did not justify a full fee award, the special master calculated a reduction for time spent on unsuccessful claims of approximately 12%. The rationale for this reduction is carefully set out in the recommendation. It was noted that most of the attorney hours were spent on general research and investigation applicable to all the claims and that evidence adduced at hearings on unsuccessful claims contributed to the cases presented by victorious claimants. Therefore, the special master calculated

that no more than 250 hours expended by the attorneys were unrelated to the overall success achieved by the plaintiffs. Accordingly, the magistrate recommended a reduction in the plaintiffs' attorney's fees award of 250/2053 with 2053 comprising the total hours reasonably expended by the plaintiffs' counsel in Stage II of the suit. The district court adopted the recommendation of the special master with one minor exception, awarding relief to one class member found unqualified by the magistrate.

On appeal, the sole issue is whether the district court abused its discretion in adopting the special master's recommendation of the reduction in plaintiffs' attorney's fees to reflect the limited number of class members who obtained individual relief in Stage II.

The appellant, the Board of School Commissioners of Mobile County ("Board"), contends that the method used by the magistrate in calculating the reduction did not bear any relationship to the actual degree of success obtained by the plaintiffs. The defendants urged that the attorney fees award should be reduced by the number of unsuccessful claims over the total number of claims.

[1,2] This argument is expressly refuted by relevant Supreme Court authority. In Hensley vs Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the Court discussed in detail the district court's exercise of its discretion in adjusting the lodestar amount according to the "results obtained" factor. The Court observed that this is a particularly crucial concern "where a plaintiff is deemed

'prevailing' even though he succeeded on only some of his claims for relief." Id. at 434, 103 S.Ct. at 1940, 76 L.Ed.2d at 51. After noting situations when an adjustment to the lodestar may be appropriate, the Court outlined a method for accomplishing the reduction emphasizing that "the most critical factor is the degree of success obtained." Id. at 436, 103 S.Ct. at 1941, 76 L.Ed.2d at 52. The Court distinguished between claims different in all respects from the plaintiff's successful claims, which should be excluded in considering the amount of a reasonable fee, and related claims, some of which were wholly or partially unsuccessful. In a case involving related claims where the overall results are excellent, "the fee award should not be reduced simply because the plaintiff

failed to prevail on every contention raised in the lawsuit." Id. at 435, 103 S.Ct. at 1940, 76 L.Ed.2d at 52. Where a plaintiff achieved only limited success on related claims, however, the district court should award only that amount of fees that is reasonable in relation to the results obtained. Id. at 436, 103 S.Ct. at 1941, 76 L.Ed.2d at 51-52. In determining what is reasonable, the Court stated:

> We agree with the District Court's rejection of a 'mathematical approach comparing the total number of issues in the case with those actually prevailing upon.' [Citations omitted.] Such a ratio provides little aid in determining what is a reasonable fee in light of all

the relevant factors.

Id. at 435-36 n. 11, 103 S.Ct. at 52 n. 11. Thus, the Board's argument is without merit. Similarly, the Board's contention that the failure of the plaintiffs' attorneys to keep adequate time records justified a further reduction of the fee award is refuted by the special master's special findings of fact regarding the allocation of time between successful and unsuccessful claims. These findings are not clearly erroneous. United States vs U.S. Gypsum Co., 333 U.S. 364, 365, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

[3] On cross-appeal, the plaintiffs urge that the district court erred in allowing any reduction of attorney fees due to the limited number of claimants who recovered in the Stage II proceedings. The plaintiffs maintained

that the district court misunderstood the functions of a bifurcated employment discrimination suit. Once the class established discrimination at the end of Stage I and received general injunctive relief, they were the prevailing parties and entitled to fees for all reasonable time expended in Stage II. The plaintiffs claim that the special master's recommendation at the close of the Stage II proceedings, in effect, applied a second prevailing party test to a suit already determined to be a plaintiff's victory. According to this argument even the plaintiffs who did not obtain individual favorable judgments in Stage II prevailed in obtaining class-wide injunctive relief in Stage I.

First, we note that the class has already received attorney's fees for their success in Stage I. Secondly, the

plaintiffs misunderstand the nature of the "results obtained" analysis. The determination that a plaintiff is the "prevailing party" merely brings him "across the statutory threshold. It remains for the district court to determine what fee is 'reasonable.'" Id., 461 U.S. at 433, 103 S.Ct. at 1939, 76 L.Ed.2d at 50. Thus, the district court's reduction for the limited success obtained by the plaintiffs did not require a second prevailing party determination. Rather, the district court correctly followed the language of the attorney's fees statutes and Supreme Court in setting a "reasonable" fee for the prevailing party by making it "clear that it has considered the relationship between the amount of the fee awarded and the results obtained." Id. at 437, 103 S.Ct. at 1941, 76 L.Ed.2d at 53.

The plaintiffs next assert that since the Stage II proceedings are merely the means by which the individual class members obtained the fruits of the Stage I judgment against the defendants, the proceedings may be likened to post-judgment enforcement measures. In Turner vs Orr, 785 F2d 1498 (11th Cir.), cert. denied, - - U.S. - -, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986), the court held that attorney's fees arising out of the plaintiffs' monitoring committee's post-judgment efforts at enforcing a consent decree entered in a class action arising under Title VII were properly chargeable to the defendants. Id. at 1504. Although many of the individual post-judgment efforts were unsuccessful, the measures were necessary to enforce the judgment and could not be severed from matters upon which the plaintiffs

prevailed in obtaining the judgment. Id. at 1503. Although the plaintiffs acknowledge that the Turner decision rested in large part upon the language of the consent decree, they contend that the case still supports their position that success in Stage I of the litigation guarantees that all necessary enforcement steps, such as the individual Stage II hearings, are properly charged as costs of the prevailing party whether successful or not.

The plaintiffs also point out that the district court's Stage II order required the class attorneys to continue to represent the individual members who did not elect to choose their own attorneys or represent themselves. The court order, according to the plaintiffs, laid a legal and ethical obligation upon them to represent the class members and

therefore the award should fully compensate the plaintiffs for all attorney time spent in reasonable response to the court order. Adams vs Mathis, 752 F2d 553 (11th Cir. 1985).

While this argument is appealing, we find it unpersuasive under the particular facts of this case. In Adams, we indicated that results, although not the controlling criteria, remain an important factor in setting an attorney's fees award even where a lawyer performs a specific task at the request of the court. Id. at 554. Furthermore, the rationale advanced by the plaintiffs for reversal of the reduction is inconsistent with the special master's analysis under another Johnson factor. The plaintiffs assert that their success in Stage I of this litigation (for which they were fully compensated), as well as the

district court order designating the class attorneys as counsel for the individual class members, in effect, guaranteed the plaintiffs recovery for attorney time expended in presenting the Stage II claims. And yet, the special master allowed the plaintiffs a 30% contingency fee enhancement, which is unchallenged on this appeal, because recovery of their attorney's fees was uncertain.[6] The plaintiffs can not have it both ways. In short, we are mindful

[6]We note that the imposition of a contingency enhancement to the lodestar figure has been called into question by the Supreme Court and expressly reserved for reargument. Pennsylvania vs Delaware Valley Citizens Council, -- U.S. - -, --- - ---, 106 S.Ct. 3088, 3099-31100, 92 L.Ed.2d 439, 458 (2986). Our own court is soon to address this issue in en banc reconsideration of Lattimore vs Oman Construction, 795 F2d 930 (11th Cir. 1986). This aspect of the magistrate's recommendation, however, was never mentioned on this appeal; therefore, this issue is deemed abandoned. Rogero vs Nooone, 704 F2d 518, 520 n. 1 (11th Cir. 1983).

the district court has discretion in determining the amount of a fee award. Hensley, 461 U. S. at 437, 103 S.Ct. at 1941, 76 L.Ed.2d at 53. The recommendation of the special master, adopted by the district court in this case, provides a clear explanation of the reasons for the attorney's fees award in light of the considerations expounded by the Supreme Court and this circuit. No clear abuse of discretion is apparent. Odum vs Clark, 748 F2d 1538, 1541 (11th Cir. 1984). Accordingly, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-7064

EDWIN FOSTER, et al

Plaintiffs-Appellees
Cross-Appellants,

Verses

BOARD OF SCHOOL COMMISSIONERS
OF MOBILE COUNTY, ALABAMA
et al

Defendants-Appellants,
Cross-Appellees

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA

ON PETITION(S) FOR REHEARING

BEFORE: FAY and JOHNSON, Circuit Judges, and HENDERSON, Senior Circuit Judge

PER CURIAM:

The petition for rehearing filed by {appellants is denied.}

ENTERED FOR THE COURT:

(original signed by)
United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EDWIN FOSTER, JAMES E. BUSKEY et al	*	
Plaintiff	*	
VS	*	80-0460-H-S
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ALABAMA et al	*	
Defendant	*	

RECOMMENDATION OF THE MAGISTRATE

This action is submitted for recommendation on Plaintiffs' request for an award of attorneys' fees. Discovery was conducted on the request, an evidentiary hearing was held on October 9, 1985, and each side has submitted briefs.

The request is governed by Johnson

v. Georgia Highway Express, Inc., 488 F2d 714 (5th Cir. 1974), its progeny in this Circuit, and the principles established by the Supreme Court in Blum v. Stenson, _____ U.S. _____, 79 L.Ed2d 891 (1984), and Hensley v. Echerhart, 461 U.S. 424 (1983). The principles governing a fee award under Title VII of the Civil Rights Act of 1964 and under 42 U.S.C. Section 1988 are the same. In both Acts, Congress established two goals for the fee award: (1) To compensate plaintiff's counsel fairly and (2) to fix compensation at a level that would make representation of civil rights plaintiffs attractive to counsel skilled in complex federal court litigation. Though there have been many and varied efforts at deriving an objective formula for complying with these Congressional purposes in calculating such awards, the

actual calculation is within the general discretion of the district court and "[t]here is no precise rule or formula for making these determinations." Hensley v. Eckerhart, supra, 461 U.S. at 436.

The twelve-factor analysis of Johnson v. Georgia Highway Express continues to govern fee awards in this Circuit, see e.g., Jones v. Central Soya Co., 748 F2d 586 (11th Cir. 1984). The Court in Hensley v. Echerhart, supra, noted, citing Copeland v. Marshall, 641 F2d 880, 890 (D.C. Cir. 1980), that many of the Johnson factors are "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." 461 U.S. at 434 n.9. Again in Blum v. Stenson, supra, the Court noted that one or more of the Johnson factors were normally

elements used in identifying a reasonable hourly rate. 79 L.Ed.2d at 901-02. The approach taken below is, first, to determine the amount of time reasonably devoted to this action. A reasonable non-contingent hourly rate for work of the kind performed by the lawyers for plaintiffs, in light of the training and experience of those lawyers, is then determined. Next, any factors that might warrant adjustment of the on-contingent hourly rate are addressed, and adjustments made. Following that, a fee recommendation is made and compensable expenses are determined.

A. Compensable Time. Five lawyers have submitted claims for compensation. They are James U. Blacksher, Larry Menefee, Gregory Stein, Christopher Clanton, and Janice Spears. The first three are members of the firm of

Blacksher, Menefee & Stein, which has been involved in this case as class counsel throughout its prosecution. Mr. Clanton and Ms. Spears are sole practitioners who were associated by Blacksher, Menefee & Stein to perform certain discrete functions in the case.

Blacksher, Menefee, and Stein have previously filed a claim for fees for "Stage I" of the litigation and an order was entered March 12, 1982, awarding approximately $21,000.00 for services to the class through May 7, 1980. That award was based on time spent by Mr. Blacksher alone. In that proceeding, Mr. Blacksher sought and was awarded an unadjusted hourly rate of $60.00. The claim advanced in the present computation is for all time and expenses subsequent to May 7, 1980. The time for each lawyer for which compensation is sought is as

follows:

James Blacksher	89.6 hours
Larry Menefee	218.2 hours
Gregory Stein	1,546.5 hours
Christopher Clanton	20.0 hours
Janice Spears	293.2 hours

Those time claims total 2,167.5 hours.

The Magistrate has reviewed the detailed time reports filed by Messrs. Blacksher, Menefee, and Stein. Those records reflect no unnecessary duplication of effort among the three lawyers and the Magistrate has observed no unnecessary duplication in the in-court proceedings. In light of the overall magnitude of the case, the amount of discovery involved, and the tenacity of the defense, there is no basis for a determination that the total hours claimed by Blacksher, Menefee, and Stein are excessive. See Johnson v. University College, 706 F2d 1205, 1208 (11th Cir. 1983).

The Defendants attack only a few of the specific hours claimed by Blacksher, Menefee & Stein. Within the claims are approximately two hours of time devoted by Mr. Stein to press interviews which do not appear to have been necessary for the prosecution of the claims. The other times attacked by Defendants include conferences with applicants for a paralegal position created for this litigation, conferences with the attorney for the entity which in part funded the litigation (see discussion below), and time devoted to preparation of the earlier attorneys' fee claim. The Magistrate finds that the first two categories of time were necessarily incurred for the efficient prosecution of this litigation. The Court's order of March 12, 1982, awarding interim fees specifically excludes the fee-petition

time claimed in this request and directs counsel to make the claim in the present request. Accordingly, it is not properly excluded.

The twenty hours incurred by Mr. Clanton were devoted to preparation of defenses to the Board's summary judgment motion and the hours appear reasonable.

Ms. Spears has filed a claim for approximately 293 hours. Ms. Spears did not testify at the attorneys' fee hearing and her precise role in the litigation has not been fully defined. She presented the claims of approximately ten class members in a workmanlike fashion and the time devoted to those hearings and to necessary preparation for them clearly is compensable at the attorney rate established below. She also performed certain evidence production and interview work of the type a young law

firm associate would be assigned. There are, however, a number of entries in Ms. Spears' time reports labelled simply "research" or "file review" which cannot be related to any particular claim. Many of the "research" entries appear redundant of similar contemporaneous entries made by Mr. Stein. There are a number of entries in her time records which appear to be in the nature of paralegal work rather than lawyer time (see entries of February 7, 8, 15, 22 and March 13, 21, 23 and 26). In addition, there is an entry indicating that Ms. Spears worked all 24 hours of August 3, 1985, on statistical data. This otherwise unexplained entry will be excluded as factually improbable.

Claimants bear the burden of proving that the time claimed is compensable at an hourly rate appropriate to legal work.

There was no evidence offered by Defendants that Ms. Spears' time was not in fact spent on this litigation. The Magistrate concludes that the claim of Ms. Spears contains 24 hours for which no compensation is appropriate (August 3), and 88 hours which appear more likely than not to have been work in the nature of paralegal work rather than lawyer time. Those hours should be compensated at an appropriate paralegal rate of $30.00 per hour. In summary, the Magistrate finds that Ms. Spears should be awarded fees based upon 181.2 hours at an attorney rate and 88 hours at a paralegal rate.

B. Non-Contingent Hourly Rate. The "market rate" for lawyer time is the rate prevailing in the community for similar services by lawyers of reasonably comparable skill, experience and

reputation. Blum v. Stenson, supra, 79 L.Ed.2d at 900 n.11. Subsumed in a determination of an appropriate non-contingent hourly market rate are the following Johnson factors: Customary rate, novelty and difficulty of questions, skill required to perform services, experience, reputation, and ability of plaintiffs' attorneys, nature and length of relation of the attorneys with their clients, preclusion of other employment, undesirability of the case, and time limitations imposed by client and circumstances.

1. Customary Rate. Testimony was received from six Mobile lawyers with substantial practice in federal court. The testimony of those lawyers establishes that the non-contingent fees customarily charged by lawyers with approximately 10 years' experience

billing on an hourly basis for federal civil litigation range from $70.00 to $125.00 per hour. The attorneys called by Defendants testified to customary rates in the $70.00 to $85.00 range. The attorneys called by Plaintiffs testified to customary rates in the $85.00 to $125.00 range.

2. Novelty and Difficulty of Questions, Skill Required to Perform Services, and Experience, Reputation and Ability of Attorneys. These factors all relate to defining the portion of the broad rate scale discussed in (1) above within which the services performed in this case fall. The testimony from the lawyer-witnesses established that, in general, an individual who is a specialist in what is viewed as an arcane litigation field can command a higher rate than a litigation generalist. The

principal claimant firm - - Blacksher, Menefee & Stein - - is viewed as specializing in civil rights and employment discrimination litigation and its members enjoy (and deserve) a reputation for work in that field of the highest quality. Some legal questions in Stage II of this case were "novel" because of the lack of prior Stage II precedent, and counsel addressed a number of difficult legal questions in presenting their clients' claims and in resisting the defenses advanced by the Board. The presentation of the Stage II claims required a significant degree of skill, though not at a level exceeding that required in any relatively complex federal civil litigation.

3. Nature and Length of Relation with Clients. The evidence establishes that federal civil litigators with a

long-term relationship with a client frequently bill the client at an hourly rate that is less than the lawyers would charge to a one-time client. The relationship in this case between Plaintiffs and their lawyers would not support such a reduction.

4. Preclusion of Other Employment. Blacksher, Menefee, and Stein seek compensation for approximately 1,800 hours of time devoted to this litigation over a five-year period. Most of the time was expended during the spring and summer of 1984 when individual Stage II evidentiary hearings were being conducted. The expenditure of that amount of time could reasonably be expected to preclude other employment during such times, and Mr. Stein testified regarding specific instances when he was required to decline

representation because of the time demands of this case. It would be true, however, that any attorney who undertook a substantial federal case would expect that at certain times that representation would preclude his or her taking on other matters. This factor is therefore treated as one which is already reflected in the rate described in paragraph (1) above.

5. Undesirability of Case. It remains true in this District that representation of plaintiffs in a case of this nature is undesirable for several reasons. First, counsel who succeed frequently in cases of this type are identified as "civil rights lawyers." This identity can be beneficial in that it attracts other similar claims. However, that identity also tends to be a stigma in terms of attracting other

sophisticated federal practice. The evidence establishes that, while a lawyer who does antitrust plaintiff's work is readily hired to defend a securities case or defend a Title VII case, successful plaintiffs' civil rights lawyers are not hired for other types of sophisticated federal litigation. Second, and related to the first, representation of plaintiffs in cases such as this tends to be a "high profile" position with substantial press coverage and public discussion. The evidence establishes that most entities which hire lawyers for sophisticated federal practice avoid all possibility of publicity.

6. Time Limitations Imposed by Client or Circumstances. This factor has no peculiar application to this case.

Claimants Blacksher, Menefee and Stein do not seek any differentiation

among them regarding an hourly rate. However, the fee calculation is to be based on "market" factors and the market likely would place a higher value on Mr. Blacksher's time because of his greater experience and high personal reputation.

Based upon the evidence adduced at the attorneys' fee hearing and on the Magistrate's observation of the performance of these three lawyers in this litigation, the Magistrate finds that were they employed on a non-contingent hourly basis, the local "market rate" - - which incorporates the Johnson factors discussed above - - for their services would be $115.00 per hour for Mr. Blacksher and $95.00 per hour for Messrs. Menefee and Stein. This is a current rate. Accordingly, there is no need to make any adjustment downward for historic rate increases or upward for

delay in payment. See Jones v. Central Soya Co., supra, 748 F2d at 593; Johnson v. University College, supra, 706 F2d at 1211.

The expert testimony taken in the case establishes a customary rate for persons with the approximate experience of Mr. Clanton and Ms. Spears of $55.00 to $65.00 per hour. Neither of these lawyers testified at the fee hearing and there is no evidentiary basis for a finding that any of the Johnson factors discussed above would take these lawyers' market rate out of that range. The Magistrate finds that were those lawyers employed in this case on a non-contingent hourly basis, the market value of their services would be $60.00 per hour. As with the hourly rate established for the other claimants, that is a current rate.

C. Lodestar Calculation. Prior

cases use the term "lodestar amount" to describe the pre-adjustment fee calculated as reasonable hours times market rate. Based upon the calculation of hours reasonably devoted times a reasonable non-contingent hourly rate, the "lodestar" amounts for the fee award are as follows:

James Blacksher	89.6 hours x $115.00 = $10,304.00
Larry Menefee	218.2 hours x $95.00 = $20,729.00
Gregory Stein	1,544.5 hours x $95.00 = $146,727.50
Christopher Clanton	20. hours x $ 60.00 = $ 1,200.00
Janice Spears	181.2 hours x $60.00 = $10,872.00
	88.0 hours x $30.00 = $2,640.00

D. Adjustments. Blacksher, Menefee, and Stein seek an hourly award of $200.00 per hour and Clanton and Spears seek an hourly award of $115.00 per hour, based on the Johnson factors. There are two Johnson factors not discussed above which are argued by the parties as bases for adjustment of the lodestar. These are the contingent nature of the award and the degree of success.

1. Contingency. Blacksher, Menefee & Stein had no fixed fee agreement with the named Plaintiffs or other class members. Their compensation from the class itself, if any, will come only from the Court's award. Plaintiffs' counsel did have an agreement with the Alabama Education Association ("AEA") providing for periodic payment of counsel's expenses and payment of $20.00 per hour for each hour of attorney time devoted.

Though there was some lag in payment, the AEA in fact paid these amounts from time to time to class counsel. These payments were non-contingent. In the event that no fee award is made by the Court, counsel have no obligation to repay the money. In the event the award is made, the AEA will be reimbursed. The Supreme Court in Blum v. Stenson, supra, expressly declined to determine whether a contingency adjustment is appropriate. 79 L.Ed.2d at 903 n.17. That declination was based on the fact that the record before the Court contained no basis whatsoever for a contingency adjustment. The Senate Report which is the primary expositor of the Congressional intent in adopting 42 U.S.C. Section 1988, S.Rep. No. 94-1011 (1976), specifically cites Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974), as a case that had

"correctly applied" the standards Congress wanted applied under Section 1988. That decision applied a contingency multiplier. The law in this Circuit developed since Hensley v. Eckerhart and Blum v. Stenson and in earlier cases established the principle that a contingency multiplier is often appropriate. See Jones v. Central Soya Co., supra, 748 F2d at 591-94; Carmichael v. Birmingham Saw Works, 738 F2d 1126, 1138 (11th Cir. 1984); Hall v. Board of School Commissioners of Conecuh County, 707F3d 464 (11th Cir. 1983). The Court in Jones v. Central Soya quoted its prior language in Yates v. Mobile County Personnel Board, 719 F2d 1530, 1534 (11th Cir. 1983), setting out the rationale for a contingency adjustment:

> Vindication of the policy of the law depends to a significant degree on the

> willingness of highly skilled attorneys, such as those now before the court, to accept employment in discrimination cases on a wholly contingent basis. They will hardly be willing to do so if their potential compensation is limited to the hourly rate to which they would be entitled in noncontingent employment. Busy and successful attorneys simply could not afford to accept contingent employment if those were the rules that were applied. The enforcement of our civil rights acts would then be entrusted largely to less capable and less successful lawyers who lack sufficient employment. Such an arrangement would ill serve policies of enormous national importance.

Jones v. Central Soya Co., supra, 748 F2d at 593 n.13.

The evidence presented in connection with the fee application in this case reinforces the concept advanced by the Court in Yates: It was the purpose of Congress in passing Section 1988 to encourage the effective prosecution of

civil rights cases by a fee structure that would attract competent federal litigators to civil rights plaintiffs' practice. If that "attractiveness" is to be maintained, the potential compensation in purely contingent cases must be, on an hourly basis, greater than that such successful litigators would demand in the non-contingent market. The expert testimony taken in this case in connection with the fee application would support a finding that the minimum multiplier that would draw successful federal litigators to civil rights work would be 100%.

In this case there are several nuances to the contingency factor. First, there has already been a fee award for Stage I. As of the effective date of that fee award, the Plaintiff class was the beneficiary of a determination by the

Court of Appeals that they had presumptively been the victims of a discriminatory practice. Thus the probabilities of ultimate success were quite high as of the time the claims presently before the Court began accruing. It has been held that a court in considering a contingency adjustment should analyze the litigation in its various stages and not award a contingency bonus for hours incurred after substantial success had already been obtained. See Ramos v. Lamm, 713 F2d 546, 558 (10th Cir. 1983); Chrapliwy v. Uniroyal, Inc., 583 F.Supp. 40, 51 (N.D. Ind. 1983); but see Yates v. Mobile County Personnel Board, supra, 719 F2d at 1534.

Second, some of the hours for which compensation is sought were devoted to the fee claim itself, which portion of

the case was essentially non-contingent.

Third, this case was not purely contingent. Plaintiffs' counsel were assured of recovering $20.00 per hour in the litigation regardless of success. Additionally, the Court previously observed in the March 12, 1982, fee order that the class represented by counsel was not indigent and could, if necessary, be looked to for interim compensation. There is not, however, any evidence of an actual agreement making Plaintiffs liable for attorneys' fees. Cf., Jones v. Central Soya Co., supra, 748 F2d at 592-93.

Because of the partial non-contingent payment from the AEA and because of reduced risk following the Court of Appeals' finding of a discriminatory practice, the Magistrate concludes that the 100% contingency

adjustment which might otherwise be appropriate is not in fact proper here. The Magistrate recommends that the lodestar for Blacksher, Menefee & Stein be increased by 30% because of the contingent nature of the litigation.

There was no testimony or other evidence adduced regarding the fee arrangement of Mr. Clanton or Ms. Spears. There is therefore no evidence supporting a contingency adjustment for these attorneys.

2. Result Obtained. Defendants assert that because the Magistrate's Recommendation of June 5, 1985, suggests relief for only 28 of the 104 class claimants, any award of attorneys' fees should represent only 28/104 of the amount of attorneys' fees otherwise awardable. In Hensley v. Eckerhart, supra, the Court held that in making an

attorneys' fee award, "the most critical factor is the degree of success obtained." 461 U.S. at 436. In Hensley, however, the Court noted that the determination of the extent of success involved a careful analysis of the claims advanced, the relief awarded, and the extent to which counsel's efforts actually contributed to the favorable result. The approach counseled by the Supreme Court requires analysis of whether "the relief obtained justified that expenditure of attorney time" and "the significance of the overall relief obtained by the Plaintiff in relation to the hours reasonably expended on the litigation." Id. at 435. The Court observed that hours devoted to a claim that was not successful may be compensable to the extent that the efforts devoted to that claim aided the

processing of the successful claims. 461 U.S. at 440. The Court expressly rejected the mathematical formula approach advanced by Defendants here, 461 U.S. at 435 n.11. Defendants argued that a decision in this Circuit allowed such an approach. King v. McCord, 707 F.2d 466 (11th Cir. 1983). In King, however, the formula was based on a determination of and segregation of time devoted to winning and losing claims. King does not support use of a formula based on the number of winning and losing claims.

The focus of the Court's discussion in Hensley v. Eckerhart, was cases in which a single plaintiff advanced a number of claims and prevailed only on some of those claims. The Court noted that in such a case

> much of counsel's time will be devoted generally to the

> litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis. Such a lawsuit cannot be viewed as a series of discrete claims.

461 U.S. at 435. Defendants argue that in this case it is possible to view the Stage II proceedings as involving 104 separate claims and to apportion the time to "winners" and "losers", with the fee award being based only on time devoted to "winners'" claims. Plaintiffs argue, on the other hand, that at all material times this case proceeded as a class action, that the class as a whole was afforded significant relief, and that it is improper to attempt to break the class into individual components for purposes of the fee calculation.

Stage II monetary award proceedings in a class action have attributes both of a single claim by the class and

individual claims by its members. Cf. Holmes v. Continental Can Co., 706 F2d 1144, 1154-60 (11th Cir. 1983). While it is possible to engage in extended theoretical discussion regarding the precise nature of Stage II proceedings, the Court in Hensley v. Eckerhart, supra, directed the district courts to engage in a practical analysis of the actual course of the litigation in deciding the "degree of success" issue. In that regard, the Magistrate (who conducted the Stage II proceedings to date) makes the following findings:

a. Except for individual claim statements, interrogatory answers, depositions, and summary judgment responses on behalf of each claimant, most pretrial proceedings were focused not on individual claims but on the Board's policies and practices. Thus,

discovery regarding the Board's "G-1 endorsement" defense, its "no application" defense, and its "rotation" defense was activity not divisible between successful and unsuccessful claimants. That activity would have been necessary if only successful claims were advanced.

b. In formulating the overall recommendation, the Magistrate on a number of occasions relied on evidence adduced at an unsuccessful claimant's hearing in support of findings on other claimants' cases, on the general Board defenses, or in attempting to reconstruct the actual progression process. It is not possible to quantify precisely the number of such occasions, but the number is substantial.

c. At the onset of the individual Stage II hearings, all parties appeared

to agree that the evidence on a particular claim might be relevant to other claims. At the conclusion of the first hearing, the following colloquy occurred:

> Magistrate: What do you all-- I hate to phrase it this way -- what do you all want me to do with respect to making the individual recommendations here? Do you -- and I'm just seeking the views of either side here as to whether with respect to liability on -- forget the money for a minute-- I am now in a position to make a recommendation with respect to Mr. Clarke.
>
> Plaintiffs' counsel: Judge, our response is this after conferring: As much as we want a quick ruling, one difficulty with that is that we had assumed that proof would be cumulative, that evidence received would affect the subsequent hearings to be considered. As we expect to show that there are some folks promoted to schools with A-08 certificates and these type things.

. . . .

> Defense counsel: Your honor, we have also some evidence which we think that once the Court has an opportunity to look at the overall evidence, it would be cumulative in nature and the ruling on a case-by-case basis at this point in time might be absent some other evidence the Court might need to take into consideration.

d. Having reviewed the time records submitted by Plaintiffs' counsel and having considered the actual course of proceedings, the Magistrate concludes that on average, the attorney time specifically referable to a particular claim - - for client interviews, records review, deposition attendance, discovery responses, and attendance at the evidentiary hearings - - totaled on the order of 5 to 6 hours. Applying that average, the time spent specifically devoted to unsuccessful claims

approximates 380-456 hours. No more than 250 hours of that time can be said to be related to the overall success achieved by Plaintiffs.

3. Source of Fee Payments. Public entities which are losing defendants in employment discrimination actions sometimes argue that because the taxpayers will pay the ultimate bill the court should be penurious in awarding fees. That argument has appeal, especially in circumstances were the public has no recourse against the individual officers whose discriminatory conduct led to the award. However, the law is clearly established that the award is to be calculated without regard to the fact that taxpayer funds will pay it. E.g., Hall v. Board of School Commissioners of Conecuh County, supra; Aware Woman Clinic, Inc. v. City of

Cocoa Beach, 629 F2d 1146 (5th Cir. 1980); Ramos v. Lamm, 713 F2d 546 (10th Cir. 1983); Copeland v. Marshall, 641 F2d 880 (D.C. Cir. 1980) (en banc).

E. Conclusion Regarding Fees. While Johnson v. Georgia Highway Express, Hensley v. Eckerhart, and Blum v. Stenson all attempt to highlight details of the attorneys' fee analysis, the ultimate question is what fee is reasonable, in light of the time and effort actually expended, the results obtained, and the need to assure competent counsel for civil rights plaintiffs. In this action, the Magistrate's recommendation on the merits, if adopted, would provide significant injunctive relief, monetary awards to date in the range of $1,500,000.00, plus front pay. In light of the foregoing discussion, the

Magistrate suggests that a reasonable attorneys' fee can be calculated by multiplying the lodestar rates of Blacksher, Menefee & Stein by 1.178, reflecting a 30% upward contingency adjustment, and a reduction of the award by 250/2053 or approximately 12.2%, as a reasonable approximation of hours devoted exclusively to unsuccessful claims. The claims of Mr. Clanton and Ms. Spears should be adjusted by the "unsuccessful claim" factor.

Based on the foregoing formula, the Magistrate recommends that fees be awarded as follows:

Attorney	Lodestar Amount	Adjustment	Fee
Blacksher	$ 10,304.00	1.178	$ 12,140.00
Menefee	20,729.00	1.178	24,420.00
Stein	146.727.50	1.178	172,845.00
Clanton	1,200.00	.878	1,054.00
Spears	13,512.00	.878	11,865.00

The aggregate total award (less than 15% of the monetary recovery) will look small to a plaintiff's lawyer accustomed to taking cases on a 1/3 contingency basis. However, the hourly rate, upward adjustment, and total fee are consistent with awards in other similar cases locally, and will provide reasonable compensation.

E. Expenses. In this Circuit, the recoverability of costs is determined by the necessities of the case, and even relatively large or unusual expense items may be awarded when they are reasonably incurred. Dowdell v. City of Apopka, 698 F2d 1181, 1191 (11th Cir. 1983). Except for routine office overhead expenses normally absorbed by a lawyer, all reasonable expenses incurred may be awarded. Johnson v. University College, supra, 706 F2d at 1209. Where

the evidence establishes that items such as postage, telephone expense, travel expense, etc., are not normally treated as usual overhead, such items may be recovered in the expense award. Dowdell v. City of Apopka, supra, 698 F2d at 1190 n. 13. The fees of computer personnel and investigators, when they are necessary for the prosecution of the case and are not part of general overhead, may also be recovered.

Blacksher, Menefee & Stein have filed a claim for expenses of $33,923.74 and Ms. Spears has filed an expense claim of $341.96. The testimony reflects that all the expenses were reasonably incurred in connection with prosecution of the litigation and the rates charged for the various expense items are reasonable. None of the expenses reflect items typically absorbed as office overhead.

Defendants' principal argument regarding the expenses is that much of the time for computer and paralegal assistance necessarily was devoted to the particular claims of losing claimants. No specific evidence was adduced on this point. The Magistrate recommends that the expense claims be reduced by the same "unsuccessful claim" factor used above. Accordingly, the Magistrate recommends that Blacksher, Menefee & Stein be awarded expenses in the amount of $29,785.04 and that Ms. Spears be awarded expenses in the amount of $300.24. Mr. Clanton claims no expenses.

For the foregoing reasons, the Magistrate recommends that fees and expenses be awarded in the amounts set out above. The assumption underlying the discussion regarding the result obtained in the case is that the Magistrate's

Recommendation of June 5, 1985, will be adopted without substantial modification. Because of that premise, resolution of this fee and expense Recommendation should be deferred until a final decision of the Recommendation on the merits is entered.

The attached sheet contains important information regarding objections to this Recommendation.

Done this 23rd day of October, 1985.

UNITED STATES
MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

EDWIN FOSTER et al	*	
Plaintiff	*	
VS	*	80-0460-H.S.
BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY et al	*	
Defendant	*	

JUDGMENT

Pursuant to the Court's orders of December 26, 1985 and December 27, 1985, it is hereby ORDERED, ADJUDGED and DECREED that judgment be entered in favor of the following named attorneys and against the defendants, and that said named attorneys have from the defendants the following sums as reasonable

attorneys' fees pursuant to 42 U.S.C., Section 1988 and 2000e-5(k):

ATTORNEY	FEE
James U. Blacksher	$ 12,140.00
Larry T. Menefee	24,420.00
Gregory B. Stein	172,845.00
C. Christopher Clanton	1,054.00
Janice D. Spears	11,865.00

It is further ORDERED, ADJUDGED and DECREED that judgment be entered in favor of the following attorneys and against the defendants, and that said named attorneys shall have the from the defendants the following sums as reasonable expenses:

Attorney	Expenses
Blacksher, Menefee & Stein	$38,225.66
Janice D. Spears	300.24

It is further ORDERED, ADJUDGED and DECREED that interest at the legal rate of 7.57% shall accrue from the date of the entry of this judgment.

DONE this the 27th day of December, 1985.

Chief Judge

86-2031

No. _____

Supreme Court, U.S.
FILED
JUN 22 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

BOARD OF SCHOOL COMMISSIONERS
OF MOBILE COUNTY, et al.,

Petitioners,

v.

EDWIN FOSTER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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No. _____

IN THE
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OF MOBILE COUNTY, et al.,

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v.

EDWIN FOSTER, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Edwin Foster, James

E. Buskey and the class they represent, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Eleventh Circuit's opinion in this case. That opinion is reported at 810 F.2d 1021.

The Statement of Facts in the Petition is not an accurate recitation of the evidence in the record, but a sufficient statement of the facts appears in the Eleventh Circuit's opinion, 810 F.2d at 1022-1023.

REASONS WHY THE WRIT SHOULD BE DENIED

1. No substantial question is presented: the Petition asks this Court to review findings for abuse of discretion by the trier of fact.

The Petition concedes that the

district court's purported failure adequately to distinguish lawyer hours related to successful and unsuccessful claims "is subject to an abuse of discretion standard" (Pet., p.11), and contend, as they must, that "[t]he District's Order [sic] abused the Court's discretion" (Pet., p.12).

The Eleventh Circuit Court of Appeals correctly applied a clearly erroneous standard to review Petitioners' contention that plaintiffs' counsel failed to keep adequate time records, 810 F.2d at 1024, and Petitioners do not contend that the Court of Appeals erred in applying that standard of review.

In short, no question of law is presented by the Petition and any review of the district court's award of

attorneys' fees would be on the basis of the abuse of discretion and clearly erroneous standards.

2. The fact intensive question of the adequacy of plaintiffs' time records has already been reviewed three times.

The issue of whether plaintiffs' time records and other explanations of their labor were sufficient to determine an award of attorneys' fees is by its nature a question of fact peculiar to the case in which it is presented. Here, the finding that the time records and other explanations of counsel were adequate is a finding that has already been reviewed three times: by the district court's adoption of the magistrate's report (R.2-39), by the Court of Appeals'

decision (810 F.2d at 1024), and by the Court of Appeals' denial of rehearing (Pet., Appendix B). A further review of that question of fact by this Court is not warranted.

3. The Petition for Certiorari seriously misrepresents the evidence and the district court's holding.

The Petition misrepresents the evidence received on the attorneys' fees issue. While Respondents will not attempt to correct each such misrepresentation, they cite the following examples.

The Petition for Certiorari selectively edits a sentence from Respondents' pleading, filed in response to the magistrate's order directing

plaintiffs to specify, "to the extent feasible," the class member to whom a particular time entry referred. (Pet., p.5). The whole text of that pleading reveals that time attributable to work with individual class members was identified by class member name in the vast majority of instances and that the portion of the sentence quoted by respondents means only that a given time entry, say, two hours, cannot be divided further among the class members listed:

> Pursuant to the Magistrate's order of August 27, 1985, plaintiffs submit this further specification of time, specifying to the extent feasible the class members to whom time entries referred. Attached hereto are copies of the time logs of the lawyers involved which encompass the times during which the stage II hearings were held. Where a time entry refers to a

> particular class member, it has been underlined in red ink. Additionally, where the time logs refer to stage II hearings without listing a class member's name, a comparison of the hearing dates has been made and the names of the class members involved are printed in the margin. However, in both cases, because all time expended on a given date is listed in a single sum, with no further breakdown as to time spent on particular services, it is not feasible in most instances to attribute a particular amount of time to a certain class member.

(R.1-28-29.) Similarly, the Petition does not reveal that attached to that pleading were some 30 pages of time records annotated by hand with the names of the class members to whom time entries referred. (R.1-29-59.)

Petitioners likewise misrepresent the district court's holding when they say that the magistrate "estimated from the inappropriate time records and from

his personal recollection" of the stage II hearings in making a 12.2% reduction in plaintiffs' fees (Pet., p.5), and when they cite only one paragraph of the magistrate's specific findings on this issue and call it "his best guesswork" (Pet., p.10). The Court of Appeals viewed the matter differently, terming the magistrate's attorneys' fees opinion "an exhaustive recommendation following the analysis in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir.1974)," and stating that "[t]he rationale for this reduction is carefully set out in the recommendation." 810 F.2d at 1023.

The record in fact reflects that the magistrate made a number of specific findings of fact upon which he based his

calculation of the fee award and its 12.2% reduction attributable to the unsuccessful class members. The magistrate's written recommendation was not attached to the copies of the Petition served on undersigned counsel. Since there is a risk that it was omitted from copies filed with this Court, we set out the following specific findings:

> Stage II monetary award proceedings in a class action have attributes both of a single claim by the class and individual claims by its members. Cf. Holmes v. Continental Can Co., 706 F.2d 1144, 1154-60 (11th Cir.1983). While it is possible to engage in extended theoretical discussion regarding the precise nature of Stage II proceedings, the Court in Hensley v. Eckerhart, supra, directed the district courts to engage in a practical analysis of the actual course of the litigation in deciding the "degree of success" issue. In

that regard, the Magistrate (who conducted the Stage II proceedings to date) makes the following findings:

a. Except for individual claim statements, interrogatory answers, depositions, and summary judgment responses on behalf of each claimant, most pretrial proceedings were focused not on individual claims but on the Board's policies and practices. Thus, discovery regarding the Board's "G-1 endorsement" defense, its "no application" defense, and its "rotation" defense was activity not divisible between successful and unsuccessful claimants. That activity would have been necessary if only successful claims were advanced.

b. In formulating the overall recommendation, the Magistrate on a number of occasions relied on evidence adduced at an unsuccessful claimant's hearing in support of findings on other claimants' cases, on the general Board defenses, or in attempting to reconstruct the actual progression process. It is not possible to quantify precisely the number of such occasions, but the number is substantial.

c. At the onset of the individual Stage II hearings, all

parties appeared to agree that the evidence on a particular claim might be relevant to other claims. At the conclusion of the first hearing, the following colloquy occurred:

> Magistrate: What do you all -- I hate to phrase it this way -- what do you all want me to do with respect to making the individual recommendations here? Do you -- and I'm just seeking the views of either side here as to whether with respect to liability only -- forget the money for a minute -- I am now in a position to make a recommendation with respect to Mr. Clarke.
>
> Plaintiffs' counsel: Judge, our response is this after conferring: As much as we want a quick ruling, one difficulty with that is that we had assumed that proof would be cummulative, that evidence received would affect the subsequent hearings to be considered. And we expect to show that there are some folks promoted to schools with A-08 certificates and these type things.
>
> . . . .
>
> Defense counsel: Your honor, we have also some evidence

> which we think that once the Court has an opportunity to look at the overall evidence, it would be cummulative in nature and the ruling on a case-by-case basis at this point in time might be absent some other evidence the Court might need to take into consideration.
>
> d. Having reviewed the time records submitted by Plaintiffs' counsel and having considered the actual course of proceedings, the Magistrate concludes that on average, the attorney time specifically referable to a particular claim -- for client interviews, records review, deposition attendance, discovery responses, and attendance at the evidentiary hearings -- totaled on the order of 5 to 6 hours. Applying that average, the time spent specifically devoted to unsuccessful claims approximates 380-456 hours. No more than 250 hours of that time can be said to be unrelated to the overall success achieved by Plaintiffs.

Whereas, in this case, the trial court has made a meaningful calculation of the hours spent on successful and

unsuccessful claims, this Court is not likely to set it aside as clearly erroneous. See City of Riverside v. Rivera, 106 S.Ct.2686, 2692 n.4 (1986) (rejecting a similar challenge to the adequacy of attorneys' records because "[t]he District Court ... does not appear to have shared this view").

4. Petitioners have abandoned their argument that an enhancement is inappropriate in this case.

In the last sentence of the Petition for Certiorari, Petitioners assert that respondents are not entitled to an enhancement of their fees in this action. (Pet., pp.13-14.) The Court of Appeals specifically held that Petitioners had abandoned that issue.

810 F.2d at 1025, n.6.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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BY: James U. Blacksher
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Counsel for Respondents

CERTIFICATE OF SERVICE

I do hereby certify that on this 29 day of May, 1987, a copy of the foregoing RESPONDENTS' BRIEF IN OPPOSITION was served upon the following counsel of record:

Thomas R. McAlpine, Esq.
Robert C. Campbell, III, Esq.
Sintz, Campbell, Duke, Taylor
& Cunningham
3763 Professional Parkway
Mobile, Alabama 36633

by depositing same in the United States Mail, postage prepaid.

COUNSEL FOR RESPONDENTS